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IN THE

Supreme Court of the United States

ARKANSAS OAK FLOORING COMPANY AND AMERICAN SURETY COMPANY OF NEW YORK ..... *Petitioners and Appellants Below,*

v. No. .....

LOUISIANA & ARKANSAS RAILWAY COMPANY ..... *Respondent and Appellee Below.*

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE FRED M. VINSON, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.

Summary Statement of the Matter Involved

This case involves the construction of Section 16, Paragraph (3), Subdivision (e) of the Interstate Commerce Act, which provides that the cause of action in respect of a shipment of property in interstate commerce shall, for the purpose of the section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after. 49 U. S. C. A. Sec. 16 (3) (e). It involves, particularly, the application of that provision of the statute to an action by a carrier for recovery of a balance of freight charges on inbound shipments of rough materials, under a tariff providing for transit and credit privileges, where correspond-

ing outbound shipments of manufacturer products were not made as prescribed by the tariff. The majority of the Circuit Court of Appeals decided that the said provision of the statute was not intended to apply, and did not apply, to such a case and that an action for the recovery of such charges can be maintained, although begun more than two years after the delivery of the shipments by the carrier (Tr. pp. 79 and 80).

On various dates from September 12, 1942, to May 12, 1943, respondent delivered to petitioner Arkansas Oak Flooring Company at Alexandria, Louisiana, 35 carloads of rough hardwood lumber shipped from Woodville, Mississippi. The shipments moved under a rough material tariff which provided for a local rate of 20 cents per hundredweight with a further provision that the shipper might secure a refund, or credit, of 8 cents per hundredweight, by shipping outbound manufactured products to the extent and in the manner specified in the tariff and within one year from the dates of the paid freight bills covering the inbound movements of the rough hardwood lumber (Tr. pp. 19 to 21).

The tariff provided further that a shipper might secure *credit privileges* under which it might pay a net transit rate of 12 cents per hundredweight on the rough hardwood lumber when delivered and have credit extended to it for the anticipated refund of 8 cents per hundredweight. The credit privileges were obtained by entering into a contract with respondent supported by bond to fulfill the requirements of the tariff. Prior to the handling of the shipments in question, a contract in the prescribed form was executed by petitioner Arkansas Oak Flooring Company supported by bond with the petitioner American Surety Company of New York as surety on the bond (Tr. p. 15). When the several shipments of rough hardwood lumber were delivered by respondent, within the dates mentioned above, it collected the net transit rate of 12 cents per hundredweight (Tr. p. 19).

Through a misunderstanding which was caused or contributed to by the previous course of dealing between the parties (Tr. pp. 22 to 26), the petitioner Arkansas Oak Flooring Company failed to make the outbound shipments

of manufactured products which were required for the said 35 carloads of rough hardwood lumber in the manner and within the time prescribed by the tariff (Tr. p. 21).

On September 11, 1945, respondent began this action to recover the additional freight charges claimed by it on the said 35 carloads of rough hardwood lumber, claiming the normal local rate of 20 cents per hundredweight on the said lumber, less the partial payments which had been made on delivery of the shipments (Tr. p. 4). As is apparent, the action for such additional freight charges was not begun within two years from the time the shipments were delivered by respondent at Alexandria, Louisiana, as prescribed by Paragraph (3) of Section 16 of the Interstate Commerce Act. On the trial of the case the District Court was of the opinion that the two years prescribed by the statute meant two years from delivery of the manufactured products to ultimate destination rather than two years from delivery of the shipments by respondent. 69 F. Supp. 372. The case was appealed to the Circuit Court of Appeals which held, in effect, that the provision of the tariff for credit privileges had the legal effect of postponing the accruing of the cause of action until the expiration of the period of one year allowed for the shipment of outbound manufactured products and that Paragraph (3) (e) of Section 16 of the Interstate Commerce Act was not intended to apply and did not apply to this case (Tr. pp. 78 to 80). The decision of the court was rendered February 20, 1948 (Tr. p. 83).

This case presents a substantial question which affects many shippers as well as carriers. Large quantities of freight are shipped each year under tariffs containing provisions similar to those involved here. The decision of the Circuit Court of Appeals in this case is in apparent conflict with the decisions of other Circuit Courts of Appeals, as well as the language of the statute itself, and the rights of the parties to all similar shipping contracts have been brought into doubt.

Jurisdiction of this case is given to this court by Section 240 of the Judicial Code, as amended.

II.

Reasons Relied On for the Allowance of the Writ

1. The decision of the said Circuit Court of Appeals as to the time when this cause of action accrued is in conflict with the decision of the United States Circuit Court of Appeals for the Fourth Circuit, on the same matter, in the case of *Pennsylvania R. Co.* v. *Carolina Portland Cement Co.*, 16 F. (2d) 760, and is in conflict with the decision of the United States Circuit Court of Appeals for the Seventh Circuit in the case of *Wisconsin Bridge & Iron Co.* v. *Illinois Terminal Co.*, 88 F. (2d) 459.

2. The decision of the said Circuit Court of Appeals as to the time when this cause of action accrued is a decision of a federal question in a way probably in conflict with applicable decisions of this court.

3. The decision of the said Circuit Court of Appeals as to the time when this cause of action accrued, if not in conflict with applicable decisions of this court, involves an important question of federal law which should be settled by this court.

4. The said Circuit Court of Appeals erred in holding that Paragraph (3) (e) of Section 16 of the Interstate Commerce Act did not apply to this action.

5. The said Circuit Court of Appeals erred in refusing to dismiss this action because it was not begun within two years from the delivery of the shipments of the property by the carrier.

Wherefore, your petitioners pray that a writ of *certiorari* issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 11,966, *Arkansas Oak Flooring Company, et al., Appellants* v. *Louisiana & Arkansas Railway Company, Appellee,* to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of

Appeals be reversed by this court, and for such further relief as to this court may seem proper.

Dated at Pine Bluff, Arkansas, April 9, 1948.

ARKANSAS OAK FLOORING COMPANY AND
AMERICAN SURETY COMPANY OF NEW YORK,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

I.

Opinions of Court Below

The opinions in the Circuit Court of Appeals for the Fifth Circuit were announced February 20, 1948. At the time of the printing of this brief they had not been reported in the Federal Reporter. The majority opinion is copied in the transcript at pages 72 to 80 and the dissenting opinion is copied at pages 80 to 82.

II.

Jurisdiction

1. The date of the judgment to be reviewed is February 20, 1948 (Tr. p. 83).

2. The statutory provision which is believed to sustain the jurisdiction of this court is Section 240 of the Judicial Code, as amended. U. S. C. A., Title 28, Sec. 347.

3. This case was brought by respondent as a carrier engaged in interstate commerce for recovery of a part of its charges in respect of shipments of property (Tr. pp. 1 to 4) and was not begun within two years from the time the shipments were delivered by the carrier (Tr. pp. 21 and 26). Under the express provisions of the statute applicable to such cases, namely, 49 U. S. C. A. Sec. 16 (3), the respondent's cause of action for the recovery of such charges accrued upon the delivery of the shipments and the action should have been begun within two years thereafter. Not having been begun within that time, it was barred and the case should have been dismissed. The decision of the Circuit Court of Appeals that it was not compelled to apply to the statute literally or at all, if such application would result in applying it in a way contradictory to its main and paramount purpose, and that Subdivision (e) of the said statute was not applicable to this case is in conflict with the decisions of the Circuit Courts of Appeals for other circuits and of this court, as well as in conflict with the plain language of the statute.

4. The cases believed to sustain said jurisdiction are as follows:

Pennsylvania R. Co. v. *Carolina Portland Cement Co.*, (Fourth Circuit) 16 F. (2d) 760;

Wisconsin Bridge & Iron Co. v. *Illinois Terminal Co.* (Seventh Circuit) 88 F. (2d) 459;

Button v. *Atchison, T. & S. F. Ry.* (Eighth Circuit) 1 F. (2d) 709;

Louisville & N. R. Co. v. *Cory* (Sixth Circuit) 54 F. (2d) 8;

Boston & M. R. R. v. *Piper*, 246 U. S. 439, 38 S. Ct. 354, 62 L. Ed. 820;

A. J. Phillips Co. v. *Grand Trunk Western Ry.*, 236 U. S. 622, 35 S. Ct. 444, 59 L. Ed. 774;

Midstate Horticultural Co. v. *Pennsylvania R. Co.*, 320 U. S. 356, 64 S. Ct. 128, 88 L. Ed. 96.

III.

Statement of the Case

This has already been stated in the preceding petition under I. (pp. .....), which is hereby adopted and made a part of this brief.

IV.

Specification of Errors

1. The Circuit Court of Appeals erred in holding that respondent's cause of action did not accrue upon delivery by respondent of the shipments in respect of which the freight charges are claimed, and in holding that such cause of action accrued 12 months after the delivery of each shipment, when the time allowed by the tariff for manufactured products to be shipped had expired.

2. The Circuit Court of Appeals erred in holding that the cause of action sued on in this case was not barred by Section 16 (3) of the Interstate Commerce Act, and in refusing to dismiss the action.

V.

ARGUMENT

Summary of Argument

Point 1. The shipment of property in respect of which freight charges are claimed in this action were the shipments of rough hardwood lumber delivered by respondent at Alexandria, Louisiana, on and prior to May 12, 1943, and under Section 16 of the Interstate Commerce Act respondent's cause of action for such freight charges accrued upon the respective dates of delivery of such shipments.

Point 2. This action, not having been brought within two years from the delivery of the last shipment of property in respect of which freight charges are claimed in this case, respondent's cause of action was barred by Section 16 of the Interstate Commerce Act and the case should have been dismissed.

1. Accrual of Cause of Action.

It is conceded that this case arose under and is governed by the Interstate Commerce Act (Tr. pp. 2 and 18). That act very definitely fixes the time when the cause of action for the recovery of freight charges by a carrier accrues. After limiting the time within which such action may be begun to two years from the time the cause of action accrues, the act provides:

> "The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after." 49 U. S. C. A. Sec. 16 (3) (e).

Section 16 of the act, of which this Subdivision (e) is a part, has received much consideration by the courts. The decisions construing it were recently reviewed and summarized by this court in *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356, 64 S. Ct. 128, 88 L. Ed. 96, in which the court had this to say with regard to the policy of the act as expressed in that section:

> "With setting in such a statute, Section 16 expresses the specific policy of the Act with reference

to the assertion of stale claims. On the section's face, this policy is one of uniformity and equality of treatment, as between carrier and shipper. The section contains not one, but several limitations. All are of short duration. They apply to various kinds of relief allowed in relation to matters governed by the Act. These include proceedings before the Commission and in the courts, by both shippers and carriers. The several provisions are cast in uniform terms. Not all were brought into the section at the same time. But the legislative history shows a constant tendency toward making them uniform in time and the purpose of placing the carrier and the shipper on equal terms in this respect. Upon the face of the section nothing suggests that the limitations are to be given other than identical effects, except as the language specifies variations." *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356, 361; 88 L. Ed. 96, 101.

In conformity with the purport of the previous decisions referred to in the opinion of the court, it was held that the lapse of the statutory period of limitation not only bars the remedy, but also destroys the liability and that this statutory period cannot be avoided or extended by agreement. Since Subdivision (e) was not discussed specifically, it has been argued that it was not involved in the decision of the court although that appears to be the logical effect of the decision.

There are at least two decisions by Circuit Courts of Appeals for other circuits holding that the cause of action in a case of this kind accrues upon delivery or tender of delivery of the shipment by the carrier and not after that time regardless of what may happen between the parties after delivery has been made or tendered. In *Pennsylvania R. Co.* v. *Carolina Portland Cement Co.*, 16 F. (2d) 760, the Circuit Court of Appeals for the Fourth Circuit held that the manifest purpose of Section 16 (3) of the Interstate Commerce Act is to fix one date on which all causes of action, both those in favor of shipper and those in favor of carrier, with respect to any particular shipment, should be deemed to have accrued, so that, in the application of the section limiting time for suit, a situation would not arise wherein claims in favor of one party arising out of

a particular shipment would be barred and those in favor of the other party not be barred.

In the instant case the only shipments of property involved are the shipments of the rough hardwood lumber from Woodville, Mississippi, to Alexandria, Louisiana, which were delivered by respondent on or before May 12, 1943. That is what was alleged by respondent in its complaint which was filed when the action was begun. According to the allegations of the complaint, the suit was brought to recover an unpaid balance of freight charges on this rough hardwood lumber, and the amount claimed was the normal local rate prescribed by the tariff on that lumber in its movement from Woodville to Alexandria (Tr. p. 4). The contract between the parties, which was made the basis for the present claim, provided for the payment of freight at full local rate or rates on any portion of rough material shipped into petitioner's plant for which the percentage of tonnage required to be shipped outbound should not, within the time limit, have been shipped (Tr. p. 6). And, in the stipulation of facts on which the case was tried, it was agreed that the obligation asserted was to pay the full local rate on any portion of such rough lumber for which the required percentage of tonnage was not shipped outbound (Tr. p. 20).

This fact was stated by Lee, Circuit Judge, in his dissenting opinion in this case as follows:

> "The only shipments involved in this action are the shipments of rough hardwood lumber from Woodville, Miss., to Alexandria, La., between September 12, 1942, and May 12, 1943. The freight charges claimed by appellee represent the unpaid balance of charges from these shipments." (Tr. p. 80).

The liability asserted against petitioners in this case is based on occurrences which have taken place after the delivery of the shipments of property in respect of which the action has been brought. The decision of the majority of the Circuit Court of Appeals to the effect that the accrual of the cause of action was postponed for 12 months after the delivery of the shipments by reason of those occurrences, or by reason of tariff provisions, is in conflict with the decision of the Circuit Court of Appeals for the Fourth

Circuit in the case of *Pennsylvania R. Co.* v. *Carolina Portland Cement Co.*, cited above.

It is also in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *Wisconsin Bridge & Iron Co.* v. *Illinois Terminal Co.*, 88 F. (2d) 459, in which it was held that the fact that the period of limitation ran while a dispute as to the freight charges to be collected was being considered by the Interstate Commerce Commission at the shipper's request did not prevent the accrual of the cause of action and did not prevent the statute of limitations from being a defense to the carrier's action.

In the instant case the majority of the Circuit Court of Appeals appears to have been of the opinion that the tariff, when approved by the Interstate Commerce Commission, had the effect of law and postponed the accrual of the cause of action for 12 months because of the provision allowing the shipper that length of time within which to ship his manufactured products.

The Interstate Commerce Commission has no authority to change or suspend laws enacted by the Congress. It has authority to investigate and determine the reasonableness of rates and when rates have been established by it they have the force and effect of statutes so far as they are consistent with the law, but not where they are repugnant to it.

> *Boston & M. R. R.* v. *Piper*, 246 U. S. 439, 38 S. Ct. 354, 62 L. Ed. 820.

The question involved here was not the effect of rates which have been determined by the Commission to be reasonable, but whether the approval of a tariff by the Commission has the effect of changing or suspending the operation of a positive enactment of the Congress. The court below apparently lost sight of the fact that the powers and authority of the Interstate Commerce Commission are derivative only and cannot be exercised in opposition to applicable laws enacted by the Congress, the creator of the Commission, as was pointed out by the Supreme Court of Alabama in the case of *State* v. *Southern Express Co.*, 75 So. 343.

The Circuit Court of Appeals, also, apparently lost sight of the very clear and positive language of the statute that the cause of action should be deemed to accrue upon delivery or tender of delivery of the shipment by the carrier *and not after.*

If the right of respondent to sue did not mature until 12 months after the delivery of each shipment as stated in the majority opinion, that fact was due to an agreement made by the carrier under a tariff promulgated by it, and such an agreement could not affect the application of the statute or extend the period of limitation.

Midstate Horticultural Co. v. *Pennsylvania R. Co.*, 320 U. S. 356, 64 S. Ct. 128, 88 L. Ed. 96.

After the time allowed for shipping the manufactured products had expired and respondent's right to sue had fully matured, respondent still had one year left in which to begin its action. The fact that the time left to it was less than the period of limitation prescribed by the statute was of the respondent's own choosing, and it would not postpone the accruing of the cause of action. *Button* v. *Atchison, T. & S. F. Ry.*, 1 F. (2d) 709, decided by the Circuit Court of Appeals for the Eighth Circuit, is illustrative of the principle here involved. That case arose following the passage of the transportation act of 1920, prior to which time the state statute of limitations was applicable. When the act became effective the carrier had only 8 months left within which to begin its action for charges on a shipment of freight, but the court held that the new federal statute was applicable and that, under it, the cause of action accrued upon the delivery of the shipment and was barred three years after the delivery. In view of these decisions by other Circuit Courts of Appeals as well as the decisions of this court from *A. J. Phillips Co.* v. *Grand Trunk Western Ry.*, 236 U. S. 622, 35 S. Ct. 444, 59 L. Ed. 774, to *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356, 64 S. Ct. 128, 88 L. Ed. 96, it is submitted that the majority of the Circuit Court of Appeals for the Fifth Circuit was in error in holding that Section 16 (3) (e) of the Interstate Commerce Act was not intended to apply and does not apply to the facts of this case and that the court was not compelled to apply it to those facts.

If the question has not already been definitely settled by the decisions of this court, it is a substantial federal question which should be decided.

If Arkansas Oak Flooring Company had had any cause of action in respect of the shipments in question, either for damages or overcharge, such cause of action would necessarily have accrued upon delivery of the rough hardwood lumber to it by respondent. The contemplated later shipment of finished products would not have had and could not have had any effect on the accruing of its cause of action, but it has been held, as stated in the foregoing cases, that it was the purpose of the statute that there should be a uniformity and equality of treatment as between the carrier and the shipper, and that policy of uniformity and equality requires that the cause of action of the carrier must have accrued at the same time that the cause of action of the shipper accrued with respect to the same shipment. If one is barred, so is the other.

The confusion which now exists with regard to the meaning of Subdivision (e) of Section 16 of the Interstate Commerce Act has been emphasized by the fact that the two courts which have refused to apply its provisions to the facts existing in cases before them have differed widely in their reasons for not making the application. *In Henwood* v. *McCallum & Robinson, Inc.*, 179 Tenn. 531, 167 S. W. (2d) 981, the Supreme Court of Tennessee was of the opinion that the delivery referred to in Subdivision (e) was the contemplated delivery at the ultimate destination, after reshipment, although the property may not have been, in fact, reshipped. The majority opinion of the Circuit Court of Appeals in this case rejected that reasoning and held that the dominant intent of the statute, as a whole, is to afford two years for suit after the right of action has accrued and that respondent's right to sue on the causes of action asserted here did not, in fact, accrue on the delivery of the shipments, because of the provisions of the tariff, which had the effect of suspending, or postponing the operation of the statute.

Both of the reasons given are contrary to the language of the statute and are also, apparently, contrary to all of

the other decisions of the courts, including several decisions of this court.

It should be noticed that the tariff which was under consideration in the case of *Henwood* v. *McCallum & Robinson, Inc.*, differed very materially from the tariff under consideration in this case. The tariff there provided for the payment of a tentative initial rate for the first movement of the freight and the payment later, upon reshipment, of a through rate from the original shipping point to the ultimate destination, with a credit allowance for the tentative initial payment. In the tariff here, there was no provision for any through rate. Upon shipment of the manufactured product, the rate to be paid was the regular rate for that movement, without regard to any previous handling of the raw material. The credit offered was not on that movement, but on the rate paid for the initial local haul. These differences in the tariff provisions are sufficient to differentiate the two cases.

It should also be noticed that the court below was divided in its opinion and that Circuit Judge Lee wrote a strong dissenting opinion, in which he expressed the conviction that Subdivision (e) was applicable to the facts presented and that the judgment of the District Court should be reversed (Tr. p. 80).

The question here presented is an important question of federal law which keeps recurring and which should be settled. The court below has decided it in a way which is apparently in conflict with the import of the decisions of this court, if not in conflict with the letter of those decisions. To remove the doubt which has been raised by the decision of the court below and its conflict with the decisions of other Circuit Courts of Appeals, it is submitted that this petition should be granted and this question set at rest by this court.

2. Statute of Limitations.

Paragraph (3) of Section 16 of the Interstate Commerce Act Contains this provision, also:

"All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be

begun within two years from the time the cause of action accrued, and not after." 49 U. S. C. A. Sec. 16 (3) (a).

This provision of the statute, also, is clear and definite. The courts have held, in the cases which have already been cited, that the lapse of the statutory period of limitation destroys the liability and that the time allowed by the statute for beginning an action cannot be avoided or extended by agreement.

Midstate Horticultural Co. v. *Pennsylvania R. Co., supra.*

The period of limitation prescribed by the law relating to interstate commerce applies to all actions involving the subject matter covered by the act.

Louisville & N. R. Co. v. *Cory,* 54 F. (2d) 8.

The action in this case was begun two years and four months after the delivery of the last shipment of lumber by the respondent. Respondent's cause of action was, therefore, barred and this case should have been dismissed by the Circuit Court of Appeals.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercising by this court of its supervisory powers, by granting a writ of *certiorari* and thereafter reviewing and reversing said decision.

ARKANSAS OAK FLOORING COMPANY AND
AMERICAN SURETY COMPANY OF NEW YORK,
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